IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

J. M. COHAN,

Petitioner,

vs.

CHARLES SAMUEL ELDER and MARY ETHEL ELDER, his wife,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.
Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 26, 1941 [R. 98-103] and is not yet reported in the Federal Reporter. A previous opinion on a former appeal was rendered on June 7, 1940 and is reported in 112 Fed. (2d) 967; it is on a question not directly pertinent to this Petition.

II.

Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925. (43 Stat. 938; 28 U.S.C.A., Sec. 347.)

III.

Statement of the Case.

The essential facts of the case are stated in the accompanying Petition for Writ of Certiorari and, in the interest of brevity, are not herein repeated. Any necessary elaboration will be made in the argument which follows.

IV.

Statutes Involved.

The statute herein involved is Section 75 (a) to (s) of the Bankruptcy Act, as amended; 49 Stat. 942; 11 U.S. C.A., Section 203 (a) to (s).

V.

Specification of Errors.

The United States Circuit Court of Appeals for the Ninth Circuit erred in each of the following:

1. In failing to hold that the District Court was without jurisdiction to permit a debtor, who had his own composition and extension plan of thirty-six months approved by a majority in number and amount of his creditors and confirmed by the Court, and later modified at his own request, to claim to be "aggrieved" within the provisions of sub. (s), and secure a further three year extension thereby;

2. In failing to hold that a debtor cannot be "aggrieved" by his own act in securing confirmation of his composition and extension plan;

3. In failing to hold that the District Court was without jurisdiction to permit a debtor, who had his own plan of composition and extension of thirty-six months approved by a majority in number and amount of his creditors and confirmed by the Court, and later modified, to accept the benefits of the plan under subs. (a) to (r) for thirty-three months of the thirty-six months period and then claim to be "aggrieved", and amend under sub. (s), particularly, when the plan had but three months to live;

4. In failing to hold that once a debtor secures a confirmation of a plan he cannot secure a discharge and that proceedings under sub. (s) would then amount to a federal moratorium. And that if a debtor is permitted to amend under sub. (s) after operating under subs. (a) to (r) for thirty-three months of a plan for thirty-six months, said statute permitting same is repugnant to the 5th Amendment of the Constitution in that it is arbitrary, unreasonable and confiscatory and constitutes a denial of due process of law;

5. In failing to hold that it constituted a denial of due process of law to allow an amendment without notice to parties affected adversely thereby; and,

6. In failing to reverse the order of the District Court.

ARGUMENT.

I.

A Farmer-Debtor Who Secured the Approval of a Majority in Number and Amount of His Creditors to His Composition and/or Extension Plan and Who Had It Confirmed by the District Court Cannot Claim to Be "Aggrieved" Thereafter, and, in That Manner, Secure a Further Three Year Extension; One Cannot Be "Aggrieved" by His Own Acts; Subsection (l) of Section 75 Provides the Full Relief Intended by Congress for a Farmer-Debtor Upon Confirmation of a Plan.

The record before this Court conclusively establishes that the debtors herein had their second amended composition and/or extension plan under subs. (a) to (r) approved by a majority in number and amount of their creditors on September 27, 1937 [R. 13-17]. The plan was confirmed by the District Court [R. 24]. Eighteen months thereafter, namely, March, 1939, debtors petitioned to modify their plan as confirmed [R. 35] and this was granted [R. 45]. It is undeniable that the various plans and modifications presented by the debtors, including the one approved and confirmed, were all presented by the debtors of their own volition.

It is submitted that the provision relating to amendments[1] is unequivocal and that the language is positive. It, we contend, means that a farmer can secure the relief afforded under subdivision (s) on one of two conditions. One: If he fails to secure an agreement with his creditors; and, two: If he feels aggrieved by a plan acceptable to

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[1]Pertinent section of Act set forth in Appendix A.

creditors, but which has not, as yet, been confirmed. This creditor, your petitioner, has made a very diligent and comprehensive search of the authorities and has been unable to locate a single reported case directly on this point. This Court, speaking through Mr. Chief Justice Hughes, has declared:

> "The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to *seek* an agreement with their creditors (subsections (a) to (r)) and, *failing this,* to ask for the other relief afforded by subsection (s)." (Italics added.)
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> *Bartels v. John Hancock Ins. Co.,* 304 U. S. 180, 184.

It is respectfully urged that this Court in the above matter very definitely interpreted the act in such a manner as to warrant the conclusion that once there is a confirmation, there cannot be an amendment under (s). Once an election is made of the alternative remedies provided by Section 75, that constitutes the full relief to be afforded. Where the language of a statute is plain and unambiguous, it is the duty of the Court to enforce it according to its obvious meaning. There should be no attempt to change it by adopting a different construction, for then, there is no room for construction.

Palmer v. Massachusetts, 308 U. S. 79;
Wallace v. Cutten, 298 U. S. 229;
Bate v. Sulxberger, 157 U. S. 1;
Andrews v. St. Louis Joint Stock Bank, 107 Fed. (2d) 462; cert. den. 60 S. Ct. 592, 60 S. Ct. 711;
Sutherland, Statutory Construction, Secs. 364-366.

Congress will be presumed to have used language in a statute in its usual significance and in accordance with common understanding and the ordinary meaning. And, this Court has further held that a bankruptcy court cannot, because of its own notions of equitable principles, refuse to act in accordance with the relief mandated by Congress. Bankruptcy is a part of equity and must be enforced in accord with the general equity doctrines.

S. E. C. v. U. S. Realty & Improvement Co., 60 S. Ct. 1044, 1053, 1054.

The Court below in its opinion [R. 101] declares that the word "aggrieved" in the statute must have undoubtedly been used in its legal sense, *i. e.*, one aggrieved by an order made or action taken. We respectfully contend that the lower Court agrees with our contention that one cannot claim to be "aggrieved" by that which he, himself, elects to do, but that it declined to confine that contention to its proper limitations, and, included the word "order" which destroys the logic of their position. We concede that a debtor can be aggrieved by action taken, *e. g.*, approval of a composition plan by creditors, but we cannot conceive that it was the intention of Congress to permit a debtor to override a Court's confirmation. Moreover, by using the reasoning employed by the lower Court later in the decision, we could say that the Act does not say that which the Court infers. The argument of the lower Court falls under its own weight. A careful check of the Congressional Record for the 73rd and 74th Sessions of Congress reveals nothing that would cross our position. One of the authors of the law stated "* * * the maximum time given him (meaning farmer-debtor 'added') to pay the debt is three years. * * *." Representative Lemke,

co-sponsor of Bill, 79 Congressional Record, Part 13, page 14,331. Also, see, Senate Report No. 985, 74th Congress, May 13, 1935, which reinforces our contention. Particularly, at page 3, thereof, where it is reported "* * * The opening paragraph of subsection (s) provides that if a farmer fails to obtain a composition or extension, *or if he feels aggrieved by the composition or extension proposal,* he may amend his petition or answer, asking to be adjudged a bankrupt. * * *." (Italics added.) The lower Court in passing [R. 103] upon the above report failed to recognize that the above quotation was taken from the Senate Judiciary Committee Report on amending Section 75 and which indicated that great care was taken in the selection of the phraseology due to conflicts arising from the first farmer-debtor law (47 Stat. 1467; 48 Stat. 1289). If we carry the lower Court's definition of the word "aggrieved" to its logical conclusion, it would lead to absurd results. If their contention is correct, it would be possible for a debtor to have a composition and extension plan for a period of 10 years confirmed by the Court; modified; and then, after operating under the plan for nine years and six months, the debtor may then amend under (s) and secure a further three year extension. This Court in the case of *Haggar v. Helvering,* 308 U. S. 389, said at page 394:

> "* * * all statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with the words and with the legislative purpose."

If it were the intention of Congress to provide for amendment even though a plan be confirmed, then why was

provision made for modification (sub. (l)). Congress, we submit, had the foresight to consider that a confirmed plan might require changes after being tried out and so provided the means. The lower Court argues that the relief provided in sub. (1) is discretionary with the Court and may not be sufficient. However, it is for Congress to provide the remedy further if that were deemed necessary or constitutionally permissible. This they did not do nor did they intend to do as is evidenced by the report of the Senate Judiciary Committee *(supra)*. It is unreasonable to presume that Congress intended a farmer-debtor to have the right to present a composition or extension plan to his creditors for their approval; have it confirmed; operate under it for almost three years; and, then, to have the right to amend and secure another three years. Arbitrary laws have no place in a democracy. A creditor must not be subjected to irreparable injury by an unreasonable suspension of his remedies and to do so is in violation of the 5th Amendment.

Louisville v. Radford, 295 U. S. 555;

Continental Illinois Bank v. Chicago Ry., 294 U. S. 648.

A seven-year suspension of remedies is arbitrary and unconscionable. Granting of the same relief twice by means of legal artifices is unreasonable.

Wright v. Logan, No. 7368, Circuit Court of Appeals (7th Cir.), March 15, 1941.

Subdivision (s) provides that the farmer-debtor be adjudicated a bankrupt. Paragraph 3 of subdivision (s) provides that if the debtor redeems the property after a

sale at public auction, he may apply for a discharge. Paragraph 5 of subdivision (s) provides that "a previous discharge of the debtor, under any other section of this title shall not be grounds for denying him the benefit of this section". Paragraph 5 does not refer to compositions or extensions for there is no adjudication requiring a discharge. Congress must have taken this into consideration in enacting Title II, Section 32, sub. C of United States Code, relating to discharges for it provided:

> "The court shall grant the discharge unless satisfied that the bankrupt has (1) * * * (5) has within six years prior to the bankruptcy been granted a discharge or had a composition or an arrangement by way of composition, confirmed under this title or (6). * * *"

The foregoing statute was amended to read as above by the Chandler Act (June 22, 1935). The re-enactment of sub. (s) was in August, 1935. Discharge is a substantive right and is not merely procedure. Being substantive, subsequent amendments cannot operate retroactively. We submit, therefore, once a plan of composition and/or extension is confirmed, it is improper to allow an amendment under subdivision (s) because otherwise the very provisions militate against and nullify one another and the relief under subdivision (s) would be but a sham; as the creditors would immediately go after the debtor's property upon the expiration of the statutory period for a discharge would be impossible and subdivision (s) would degenerate into a mere moratorium statute inimical to federal legislation.

Home Bldg. & Loan v. Blaisdell, 290 U. S. 398.

II.

A Farmer-Debtor Who Has Secured a Confirmation of a Composition and/or Extension Plan and Is "Aggrieved" by It Must Amend Under Subdivision (s) Within a Reasonable Time; an Amendment Filed 33 Months After Date and But 3 Months Before Date of Expiration of Plan Was Not Filed Within a Reasonable Time; One Who Accepts Benefits of Composition and/or Extension Plan for 33 Months and Who Repeatedly During That 33-Month Period Proclaimed That Plan as Confirmed, and, as Modified, Provided Financial Rehabilitation Is Estopped From Being "Aggrieved".

Although we firmly believe that the District Court has no jurisdiction to allow an amendment once a plan is confirmed, *supra,* still, for the purpose of this discussion, let us assume that an amendment under subdivision (s) is proper after confirmation of a plan under subdivisions (a) to (r). In our situation, with the foregoing hypothesis as a basis, we submit that the District Court was without jurisdiction because the amendment was not made within a reasonable time after confirmation.

> *Wright v. Logan,* Circuit Court of Appeals, 7th Circuit, No. 7368, March 15, 1941. (Conflicts with lower Court and supports our contention.)

It is elemental in the law of statutory construction that when a statute does not set forth a time within which an act allowed therein may be done, a reasonable time is presumed to be allowed to do same. (*Sutherland on Statutory Construction,* Second Edition, and innumerable cases cited therein.) In the matter under appeal there was a plan [R. 13] in operation since September 27, 1937; that this confirmed plan [R. 24] was modified in September, 1939

[R. 45], and, when the debtors were unable to meet the terms of said modification [R. 48, 66] this creditor moved to set aside the restraining orders [R. 48] and petitioned for leave to sell [R. 66], incorporating in said two motions the fact that debtors were unable to comply with plan, as amended, and were not securing financial rehabilitation and that the plan had but three months to continue, being 33 months old. These motions were filed on July 2, 1940 [R. 51, 68], and were noticed for hearing on July 8, 1940. On July 5, 1940, these debtors filed their amended petitions [R. 52, 56], together with the recommendations of the Conciliation Commissioner in which said Commissioner declared: "It further appearing that said debtor has substantially carried out his commitments under said plan, as amended, and that said debtor has now stated under oath that he feels himself aggrieved by said composition and extension as so amended, * * *" [R. 55, 59]. Thereafter, this creditor filed the notice of motion to dismiss [R. 69] and the notice of motion to set aside the order permitting debtors to amend, etc. [R. 70]. In the latter motion, and affidavit in support thereof, this creditor charged that the recommendations of the Commissioner were false and untrue for the reason that there had not been a "substantial compliance," outlining in the affidavit that *debtors had failed to pay taxes, interest, principal sums due and operation expenses.* These were also set forth in the restraining order secured to prevent the debtors from proceeding under subdivision (s) [R. 73]. At no time was there a denial of the charges set forth by this creditor. The record before this Court is complete. Never did the debtors or Conciliation Commissioner file counter-affidavits or offer proof to the contrary. There-

fore, it was incumbent upon the lower Court to accept our affidavits as conclusive in the hearing on the motions. The reports of the Conciliation Commissioner were false and untrue within the meaning of those terms in the law appertaining to bankruptcy. The word "false" means more than erroneous or untrue and imports an intention to deceive, and a materially false statement in writing knowingly or intentionally untrue will bar a discharge.

The bankrupt's unsupported assertions of an honest intent will not overcome the natural inference from admitted facts. (*Matter of Rosenfield,* 1 Fed. Supp. 924; *Matter of Adams,* 44 Fed. (2d) 670.) We contend that the false and untrue recommendations of the Commissioner were either knowingly false or made so recklessly as to warrant a finding that he acted fraudulently. (*Third National Bank v. Schatten,* 81 Fed. (2d) 538.) In view of the fact that the lower Court will not pass upon a plea for amendment unless accompanied by the recommendations of the Commissioner, the report of the Commissioner is binding upon the debtor, and any statements knowingly false or made with such recklessness as to constitute a fraud, should be held against the debtor who furnishes said information to the Commissioner. It might be added that the practice in this district is to have the farmer keep the books and make reports, when, and if requested, to the Commissioner. We respectfully submit that it was an abuse of discretion to accept the report of the Commissioner when shown to be false and untrue.

Bouvier's Law Dictionary, Unabridged Edition, defines aggrieved as: "Having a grievance or suffered loss or injury." Funk and Wagnall's New Standard Dictionary (1940), defines aggrieved as: "Subjected to ill-treatment;

made to feel injury or injustice." It is submitted, that a construction of a statute that would enable a debtor to claim to be "aggrieved", in view of the foregoing definitions 33 months after a plan is in operation is a self-contradictory interpretation.

Finally, we refer to General Order in Bankruptcy No. 50, sub. 4, which requires a debtor under Section 75, subdivisions (a) to (r), to make an application for confirmation of a composition and/or extension plan within 90 days or suffer a dismissal of his petition. This order refers to a matter on which Congress was silent. We may validly argue that if this Court believed that a debtor might amend after confirmation of a plan under subdivisions (a) to (r), it would have set forth a time limit on that, also, By its avoidance, we conclude that the provisions of subdivision (s) relating to amendment are sufficiently clear and prohibit an amendment after confirmation of a plan under subdivisions (a) to (r); if an amendment is permissible, it still must come within the general rule of a reasonable time, an allowance of amendment, otherwise, being an abuse of discretion.

It is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Circuit Court of Appeals in this action.

April 22, 1941.

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Of Counsel.